IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.838 OF 2006

Ms Edna Vade and others ...Appellants
vs.
Ergon Developers P.Ltd. and ors. ...Respondents

Mr.P.K.Dhakephalkar Sr.Advocate with Ms S.T.Shaikh i/b
Mr.S.K.Srivastav & Co.for the Appellants
Ms Nisha Dabhade for B.M.C.
Mr.Denzil D'mello for Respondent No.1.

CORAM: A.S.OKA,J.
DATE : FEBRUARY 6,2007.

P.C.:

1. Submissions of the Advocates for the parties were heard on the last date. By order dated 21st October 2005, the learned Trial Judge dismissed the suit filed by the Appellants in default and for non prosecution and consequently Notice of Motion taken out therein was also dismissed. The learned Counsel for the Appellants submitted before me that the learned trial Judge has taken a very harsh view of the matter. He invited my attention to the Roznama of the suit. He submitted that on 6th October 2005 when the suit appeared before the Trial court for directions, the Advocate for the Appellants could not reach the court in time and therefore, the suit was kept for dismissal on 21st October 2005. He submitted that on 21st October 2005, the learned Advocate for the Appellants pointed out to the learned Trial Judge that an Application was made by the first Respondent for taking the written statement on record and therefore, the issues will have to be framed. He submitted that an opportunity deserves to be granted to the Appellants to prosecute the suit on merits.

2. The learned Counsel for the first Respondent opposed the submissions made by the learned Counsel for the Appellants. He stated that all along the Appellants have been negligent in prosecuting the suit and therefore, no indulgence be shown. The same is the submission by the Advocate for the other Respondent.

3. I have considered the submissions. I have also perused the Roznama of the suit. There appears to be some merit in the contention raised by the learned Counsel for the Appellants that on 21st October 2005 the first Respondent tried to file written statement on record. The learned Counsel for the first Respondent stated that it is not clear from the record whether the written statement of the first Respondent was taken on record on that day. Thus, it is obvious that the pleadings in the suit were not complete and therefore on 21st October 2005, the trial Court could not have proceed with the recording of evidence. The first Respondent was to file written statement on 21st October 2005.

4. In this view of the matter, the order of dismissal of the suit for default deserves to be set aside. However, the first Respondent will have to be compensated by ordering payment of costs. Considering the facts and circumstances of the case, the amount of costs is quantified at Rs.10,000/-.

5. Hence, I pass the following order :

i) The impugned Judgment and Order dated 21st October 2005 is quashed and set aside and the L.C.Suit No.5246 of 2002 is restored to the file of the Trial Court.

ii) The Appellants will pay costs of Rs.10,000/- to the first Respondent within a period of four weeks from today. The payment of costs to the Advocate for the first Respondent or deposit of the said amount with the trial court within a period of four weeks from today will be treated as sufficient compliance of the order.

iii) Parties are directed to appear before the Trial Court on 26th March 2005 at 11.00 a.m. If written statement of the first Respondent is not taken on record, the Trial Court will permit the first Respondent to file the written statement on that date.

iv) It is made clear that the Notice of Motion for interim relief is also restored and the same shall be disposed of by the Trial court expeditiously.

v) Ad-interim relief granted by this court on 27th November 2005 will continue to operate till the Notice of Motion for interim relief is finally decided.

vi) Appeal is partly allowed in above terms.

vii) Writ to be sent immediately.

JUDGE